6.931 Development of Inventions and Creative Ideas
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Chapter 2

The Role of the Patent Office and the Courts

> For the benefit of readers unfamiliar with the details of patent application prosecution and judicial review, the role of the Patent Office and courts is herein summarized.

In view of the multiple-function purpose of this book and diversity of backgrounds of its hoped-for readers, a brief review is in order of the processes involved in filing and prosecuting patent applications in the Patent Office and the role of the courts of the land in patent litigation. This chapter, obviously, will be of little interest for those knowledgeable in this field.

Perhaps an interesting way to trace the procedure would be to stand in the shoes of an imaginary independent inventor in the first flush of success in the completion of an invention. In order to obtain a patent for it, he must submit for examination by the Patent Office a detailed description that, by law, must be in a certain subscribed form and be couched in legal terminology generally quite foreign to those who produce inventions as well as to nonlegal persons in general. The patent application itself must contain a clear and concise description of the invention (termed here the specification), usually with reference to drawings illustrating a preferred form of the device, and a set of succinct terminal paragraphs, called claims, setting forth the features of novelty which the inventor and his attorney believe the Patent Office should allow as defining the scope of the patent grant.

2.1 The Nature of the Patent Office

It will be remembered that the Constitution authorized Congress to promote the progress of useful arts by securing to inventors for limited periods of time the exclusive rights to their discoveries. It has previously been pointed out, however, that, apart from a few questionably-handled procedures, as under the compensation provisions of the Atomic Energy Act or the Space Act, pure scientists have not been rewarded by Congress. Instead, the latter has seen fit to enact patent laws applicable to the applied scientist and engineer, who takes

the discoveries of the pure scientist and makes useful arts out of them. In 1952, Congress codified the patent laws, adding, however certain modifications that purported to eliminate or at least curb the disposition of some courts to strike down patents as a matter of social philosophy.

The statute itself defines the structure of the Patent Office and the mode of its operation, charging the commissioner of patents with the responsibility for the examination of every patent application and for the issuance of every patent (and trademark). Thus the Patent Office must maintain a vast up-to-date technical library, otherwise the patent examiners assisting the commissioner will not have the facilities for making reasonably thorough investigations.

The commissioner is further assisted by an appellate board in the Patent Office, termed the Board of Appeals. The members of the Board, like the commissioner, are appointed by the president and are given the title of examiners-in-chief. Their function is primarily to pass on final rejections by the examining corps which deny the patentability of the claimed inventions. Fortunately, they are selected from the experienced ranks of the Patent Office personnel and are not, as yet, purely political appointees.

Before our inventor's newly filed patent application is examined for novelty, it is screened by classification examiners to determine whether the subject matter properly relates to the class of inventions handled by a particular group of skilled examiners. Since, however, applications are normally examined in the order received, and since there is, on the average, a year's backlog of cases, our inventor will probably have to wait that long before his application is reached.

When the examiner assigned to the case reaches the application, he (or she) studies it with particular attention to the claims of novelty which he is requested to allow. These claims, if allowed, represent the metes and bounds or scope of the patent grant. The examiner then goes to the division files of patents and publications, which are broken down into many thousands of classes and subclasses, and starts his search. He is looking for the prior art that is closest to the concept claimed to be new. He looks not only for the exact device described in the application, but also for others similar to it. If the patent attorney in the case has made his own search before filing the application and failed to find an exact anticipation, it is likely that the examiner will not find one either. However, even if the invention is not found in any prior patent or publication, but is the kind of thing that any mechanic skilled is the art could easily evolve from what is in a prior patent or publication, the device is not patentable.

Having completed his search, the examiner usually takes the course of rejecting the application on the basis of the closest prior art that he was able to find. There is a very definite reason for this. Being a conscientious public servant, the examiner is not disposed to hand out patents unless he is convinced that a really new invention has been made [1]. By rejecting the case, he puts the burden of proof on the applicant to explain why the latter should be granted a

[1] If our judiciary could only experience, as practicing lawyers, the difficulty involved in successfully prosecuting a patent application in the Patent Office, their respect for patents would undoubtedly increase

patent although others may have come as close to his purported invention as in the prior art cited by the examiner.

The attorney for the applicant must then reply within six months of the examiner's rejection, pointing out why the prior art is not pertinent to his client's claim of novelty, and, if the original claims did not clearly define that novelty, appropriately amending those claims. This process of rejection (or partial rejection) and amendment or argument continues until the examiner feels that an issue has been reached. In some cases, the examiner will allow the amended claims or, upon reconsideration, the original claims, or some of them, and the patent will thereupon be granted and will take its place among over three million United States patents. In other cases, the examiner will not be persuaded as to the matter of invention. The applicant's attorney insists; the examiner is adamant that there is no invention and makes his rejection final.

Sometimes the attorney will interview the examiner in person. He may then ask the primary examiner to review the assistant's decisions. At a conference, the assistant examiner gives the primary examiner his reasons for rejection, and the attorney presents his side of the case, perhaps with the help from the inventor himself. The primary examiner then makes his decision. If he agrees with the attorney, he overrules his assistant and allows the application so that they patent may issue. If, on the other hand, he feels that the assistant is right, he will not overrule him, but will suggest that the attorney turn to the Board of Appeals.

The attorney, in the latter event, files a brief before the Board in which he describes the history of the case, the nature and details of the invention, the meaning of the rejected claims, the prior art cited by the examiner upon which the adverse ruling was based, and the reasons, factual and legal, why the attorney considers the examiner to be in error. The examiner then files a reply brief presenting his views, and the case may be decided by the Board of Appeals on these two briefs alone. An oral argument may, however, be requested. The attorney will appear before the Board to argue his case, but the examiner from whom the appeal is taken usually does not appear at the hearing.

The Board may then sustain the examiner's rejection, or overrule it and order the patent to be granted. Sometimes the Board finds that, while it cannot sustain the examiner's position, the claims are not patentable for reasons other than those advanced by the examiner. In such an event, it will offer its own grounds for rejection, permitting the applicant to modify his claims in order to overcome the new objections or to ask for reconsideration of the new grounds.

Whenever two or more applicants are claiming the same invention, "interference" examiners are assigned the task of trying to determine who is actually the first inventor. Testimony is usually taken before a notary public or court officer, subject to cross-examination, and other evidence of invention activities submitted by the conflicting applicants. Aided by these, as well as by briefs and oral argument, a Board of Patent Interferences makes a decision as to who is the prior inventor.

The commissioner cannot by himself, of course, decide or give attention to the administration of all these matters. He therefore has several assistant com-

missioners of patents. And, parenthetically, lest it be considered that Russians are the only ones who utilize the talents of women in technical fields, we have recently been ably served by a lady assistant commissioner of patents on matters regarding trademarks.

2.2 Patent Office Problems

When there is a rapid turnover in the examining crops because of attractive offers from outside organizations, particularly to the younger examiners, the backlog of cases obviously mounts. The effectiveness and utility of the whole patent system are thereby damaged. Perhaps the greater administrative problems facing the Patent Office, therefore, are, first convincing the public and Congress of the importance of its functions; and, second, the urgent necessity for promptly dignifying the position of examiner so that it will attract competent career men and women.

Automation in the form of electronic computers may come to help in the searching process. Indeed, an interesting experiment for facilitating the examiner's search in certain limited chemical cases by computer techniques is under way.

Whether sufficient time and money will ever be provided to effect the copious cross-referencing in the electrical and electronic fields, as well as in the mechanical fields, necessary for the employment of computers in the task of searching, is a real question. An inventor who files an application for a new vacuum tube, for example, might find anticipation of his tube tucked away in a prior patent for a radio-receiver circuit, in which prior patent the very same tube might have been shown incidentally, but not claimed as part of the invention. The disclosure of the earlier tube would, however, be a bar to patenting the new one. Unless the information was entered into the computer that this tube construction was disclosed, though not claimed, in the radio-receiver patent, it will not be furnished by the computer. Today, however, an examiner, in scanning a patent, can notice such incidental disclosures not predicted by the title or normal classifications of the patent.

There is, accordingly, the stupendous problem of cross-referencing the minutiae and classifying every tiny component of all the combinations shown and described in patents, if computer searching is to be successful. This is something that, to some of us, looks quite impractical as yet. Classifying certain kinds of chemical compounds may be something else again.

In 1935, only 31,900 applications still awaited preliminary or further action by the examiners, i.e., were "pending." Recently, there were almost a quarter of a million of them [2]. And there are pending before the Board of Appeals about 6,000 cases, and some hearings have been set for more than a year after the appeal was entered.

The problem of speeding up the granting of patents, consistent with reasonably thorough examination and consideration, and particularly in the light of

[2]Senate Report No. 1430, Report of the Committee on the Judiciary, 86th Congress, 2d Session (1958)

limited budget and personnel, is thus still with us, though great strides have been made in keeping the Patent Office more nearly up-to-date.

2.3 Review of Patent Office Decisions

Suppose the Board of Appeals concurs with the examiner that an application discloses no patentable invention, and thus decides adversely to the applicant. Congress has provided two alternative remedies in the nature of court review of such decision [3].

One is to file a suit against the commissioner of patents in the Federal District Court for the District of Columbia [4]. The complainant may ask the judge to review the adverse decision of the Board of Appeals, to hear the case for patentability of the invention afresh (a so-called action *de novo*), and to consider new and more detailed evidence as to the invention underlying the application and the reasons why the patent should be awarded. The District Court judge will either sustain the Patent Office rejection of the application or, if he disagrees with the Board of Appeals, direct that a patent be issued. At this trial, the commissioner is represented by his own solicitor, who cross-examines the applicant's witnesses and may present witnesses on behalf of the commissioner.

From an adverse decision of the District Court, one may appeal to the Court of Appeals for the District of Columbia Circuit. A final review by way of an appeal petition termed "certiorari" may be asked of the United States Supreme Court if the Court of Appeals refuses to reverse the Patent Office; but the Supreme Court is not apt presently to grant patents.

If, on the other hand, the applicant does not wish to go into Federal District Court, and is well satisfied with the evidence existing in the record of the prosecution of the application in the Patent Office, he can alternatively appeal to the Court of Customs and Patent Appeals, strictly upon that record [5]. This court was originally a so-called legislative court, set up under the provisions of Article I of the Constitution to serve as a tribunal of Congress, as distinguished from the judicial courts of Article III, such as the Federal District Courts, Courts of Appeals, and the Supreme Court. Congress has recently, however, converted the Court of Customs and Patent Appeals into a judicial court established under Article III. Five judges of the Court of Customs and Patent Appeals hear appeals both from customs decisions and from patent decisions. In the past, these judges have not been technically trained people, though recently patent lawyers have been considered for the bench and appointed to it, and the Court is looking more and more to them with regard to appeals from the Patent Office.

If the applicant is dissatisfied with the decision of the Court of Customs and Patent Appeals, he has the opportunity of petitioning for certiorari to the United States Supreme Court; but, within recent years, such petitions have not been granted. Similarly, when dissatisfied with the decision of the Board of

[3] The same remedies apply to trademarks and design patent cases also

[4] *35 U.S.C. 145*

[5] *35 U.S.C. 141*

Patent Interferences, the losing party may appeal to the Court of Customs and Patent Appeals, or may bring a suit in an appropriate District Court to have the Patent Office decision reversed, offering fresh testimony and evidence.

2.4 The Present Mood of the Courts

The courts of the District of Columbia are called upon, at times, to review not only the decisions of the Patent Office, but also the actions of nearly every federal administrative officer or tribunal. The Federal Communications Commission will award a radio station to party A rather than to party B; or the Secretary of the Interior will issue a land grant or a mineral lease to one party rather than to another; or the Secretary of State will deny the issuance of a passport; or some employee of the Army considers that he has lost his position unjustly. Persons dissatisfied with many administrative decisions come to the various courts of the District of Columbia each year. It is, of course, asking too much of a judge that he be skilled in the technical intricacies of all the matters handled by the various administrative agencies which, indeed, are presumably staffed by experts trained in the pertinent technical subject matters. Accordingly, the judge does not undertake in such cases to substitute his own fact finding for that of the administrative agency, except under rare circumstances. The courts have held very wisely that unless there is abuse by the administrative agency, unless the parties had not been given a fair hearing, unless there is no substantial evidence to support the agency's decision, or unless that decision is unconscionable and clearly erroneous, a court will not upset the administrative agency's findings even though, considering all the evidence, it might itself have decided the fact issues differently. A court will of course, maintain its important function of interpreting the law issues, and will readily substitute its interpretation of the law for that of the agency.

Suits against the commissioner of patents in the District Court for the District of Columbia are upon a little different footing, since the statute permits the District Court to receive new evidence not before the Patent Office nor considered by it and to make a decision based upon all the facts presented. During the relatively recent past, however, the Patent Office has been sustained in case after case by the District Court, apparently no matter what new evidence was offered [6].

Subsequent to the recent Patent Act of 1952 , which was intended to exercise a stabilizing effect upon court treatment of patents, there have been a number of reversals of the Patent Office. Some judges of the Court of Appeals of the District of Columbia, however, are apparently still hostile, as indicated by dissenting Judge Danaher [7]:

> The philosophy permeating the majority opinion basically is one

[6] Attention is invited to the anomaly (unless one recognizes the hostility to patents) of the court's giving such great weight to the Patent Office findings of *no* invention when it has declined to grant a patent, and such little weight to its findings of invention and the resulting statutory presumption of validity in suits for infringement of patents granted by it

[7] *Watson v. Bersworth*, 727 O.G. 445, 251 F. 2d 898.

> of *nullification of the remedy provided by Congress*, a result hear reached (1) by according to the Patent Office the equivalent *of a conclusive presumption of correctness*; and (2) by holding that sufficiently of disclosure raises a question of law. *Relegated to zero status* is the District Court, with its finding, its conclusions, its memorandum opinion and its judgment. Judge Wilkin heard many witnesses, had the benefit of charts and exhibits, received detailed explanations as to the points in issue and possessed the advantage of colloquy with the opposing counsel. The record discloses close and careful attention to the many aspects of the case brought under 35 U.S.C. 145 which permits a dissatisfied applicant to pursue his remedy in the District Court with may adjudge the applicant entitled to receive a patent "as the facts of the case may appear."
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> We recently pointed out that under governing case law and the Federal Rules, even as to patent cases, "a finding of fact by the District Court, sitting without jury, may be set aside on appeal only if it is clearly erroneous." We noted that in such situations we are bound to inquire whether the District Court's findings are clearly erroneous. Here, no effort is made by the majority to demonstrate that Judge Wilkin's findings are "clearly wrong" or "clearly erroneous." They are simply are peremptorily spurned as meaningless and nugatory in the context of the majority's treatment of the problem. I shall later undertake to show that the District Judge, *with thorough conviction*, arrived at his amply supported findings on the new evidence before him. I fail to see how we could have otherwise than he did.

And, more recently, Judge Burger of the Court of Appeals for the District of Columbia stated that, while he was "compelled" to follow the "present state of the decisions" in sustaining the Patent Office holding of no invention, he felt that those decisions

> impose barriers to patents far more stringent than contemplated either in the first instance by the Constitution or later by Congress [8].

Judge Burger continued,

> This case illustrates, to me, the *inhospitable attitude toward patents.* stemming in part from our natural aversion to monopolies. From the premise that monopolies are bad, it is argued that patents being monopolies are at least suspect. But a patent is a monopoly primarily in a technical dictionary sense, much as is ownership of land, and *we ought not let our reason be clouded by semantics.*
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> *This lack of hospitality toward patents* is suggested in the argument, sometimes made here by counsel for the Patent Office, that Buck

[8] *Boehringer Sohn v. Watson*, 256 F. 2d 712, 714.

> Rogers comic strips which depict rockets, jets, and the space age will no doubt operate and be cited as "anticipation" of some patent applications for such devices as the fertile brain of the cartoonist depicts for the children. It appears that unrestrained imagination, unburdened by any responsibility for the hard, patient and painstaking work of development, car bar future patent protection for the men and women who actually implement and carry out the prediction and prophecies of the Buck Rogers comic strips and the "Fantastic Stories" of the paperback trade. Indeed, Patent Office counsel advice us that Rube Goldberg cartoons have been used for this same purpose. This hardly seems the way to encourage maximum incentive for those engaged in research and invention. This could mean that widespread research and experimentation in these areas might well, by economic necessity or default, ultimately become a Government monopoly.

We can hope, accordingly, that the remedy in the federal courts, intended by Congress to grant relief from improper Patent Office decision, will ultimately be interpreted to have been restored by the Patent Act of 1952 to patent applicants.

2.5 The Reports of Patent Office and Court Decisions

Scientists have their journals describing the latest advances in the various technological fields. Similarly, lawyers have the reports of the various administrative law tribunals, such as the Patent Office, and of the courts, containing decisions in litigated cases that illustrate the current legal interpretations placed upon the various statutes and regulations, as well as how various types of factual situations are currently treated by such tribunals and courts. From these decisions, as thus reported, a lawyer, through the process of analogy, tries to answer a client's questions as to whether or not his invention is patentable, and what his legal rights may be in various situations.

In its weekly *Official Gazette*, the Patent Office publishes, in addition to regulations, rules, notices, and reports of interesting Patent Office or court decisions, a brief notice of every patent that has been granted during the week. That notice includes a typical drawing from the patent application, where appropriate, and a typical claim, perhaps representative of the scope of the patent grant [9]. Since the "claims" set forth the metes and bounds, or limits, of the exclusive privilege for which the patent was granted, an attorney, by scanning the *Official Gazette*, may learn of recent patent grants in the fields with which his clients are concerned, for the purpose both of keeping up to date and of learning of possible conflict with the client's competitors.

Patents are classified in the *Official Gazette* as general and mechanical patents, chemical patents, and electrical patents. Design patents, also granted

[9]The *United States Patent Quarterly* (U.S.P.Q.) also contains Patent Office and court decisions bearing upon patents, trademarks, copyrights, unfair competition, antitrust matters, and the like; and, as later discussed, federal court decisions on all subjects, including patents, are also contained in other reports

by the Patent Office for new and ornamental esthetic designs of various kinds of items, are also reported.

In addition, the *Official Gazette* publishes trademarks that the Patent Office proposes to register, to enable anyone who considers that such registration may hurt him to file an opposition to it. A trademark is a mark (such as a symbol or word or the like) that a party in business adopts and uses in connection with his products or services. It serves to associate these products or services, in the public mind, with the business entity that is the source or their origin – "Ivory," for example, as used on soap by Procter and Gamble. Unlike a patent, a common-law trademark is not obtained by registering it in the Patent Office, but merely by adopting and using it. However, federal registration of a mark, used in interstate commerce, provides, among other benefits, certain procedural advantages in enforcing the mark against infringers, and in obtaining trademark registrations in certain foreign countries.

I have dwelt briefly on this matter because there is today, in some quarters, renewed interest in the proposal that the Patent Office similarly publish in its *Gazette*, for opposition, its intention to grant patents. The theory is that if the public can oppose the granting of a patent by calling to the attention of the examiner some reasons why it should not be issued – such as a prior art that the examiner may have overlooked – the courts should give more than lip service to the present statutory presumption of the validity of a patent grant, discussed later, because the public had its chance to disprove the allegation of invention before the patent was issued.

In Chapter 6, I shall analyze a series of proposals for remedial legislation, including the matter of oppositions, which, for reasons later presented, I now believe more likely to be detrimental than helpful to the American patent system.

2.6 A Further Role of the Courts – Infringement Suits

Let us assume that a patent has been granted by the Patent Office. This office then loses jurisdiction of the patent, with a few minor exceptions. The next tribunal before which a patent may come is the federal District Court. How does this come about?

Somebody starts to "infringe" the patent. This may mean that someone other than the owner or a licensee under the patent makes, uses, or sells (or induces the making, using, or selling of) the invention in violation of the patent holder's right to exclude others from manufacturing, using, or selling it. (A "licensee" is one who has obtained, by suitable contract with the patent holder or one authorized to act for him, a license or right to manufacture, use, or sell the invention with the assurance that he shall be immune from suit by the patent holder. Usually some kind of license fee, often termed a royalty and frequently based upon a percentage of the business involving the invention that the licensee may do, is involved in the license contract.)

When the patent holder learns about the action, he demands that the person involved cease and desist from his infringement and account for past infringe-

ment or, if the patent holder is prepared to grant him a license, negotiate such a license.

Suppose the infringer declines to stop infringing or to negotiate a license. The patent then serves, in the words of the late Professor George Washington Pierce of Harvard University, as "a license to bring a law suit." The patent holder has the legal right to file a complaint in the federal District Court where the infringer resides or where the infringer is both doing business and committing his acts of infringement, requesting the court to issue an injunction prohibiting further infringement and to award damages to the patent holder for this unlicensed use of his invention.

The defendant-infringer must file an answer to the complaint, setting forth his reasons for defying the plaintiff's patent rights. Usually, he will list earlier similar patents or publications and refer to earlier alleged inventors or users of the invention covered by the patent, in the hope that, at the trial, he will be able to convince the court that no real advance had been made over what had been done before, of sufficient scope to warrant a patent grant, and so the Patent Office erred in issuing the patent. The defendant also usually offers reasons why his product, in view of certain differences in construction, should not be considered an infringement of the precise invention described and claimed in the patent. Other defenses may also be offered.

I ought to mention, however, another important defense that is sometimes appropriate, namely, that the patent holder is misusing his patent in violation of our antitrust laws (including restraining or conspiring to restrain trade) [10]. He may have required certain illegal restrictions, such as forcing the licensee to purchase unpatented items for him, a restriction outside the scope of the actual legal right, privilege, or "monopoly" (using the latter term in a loose sense) afforded by the patent grant.

The defendant also customarily attacks the patent by way of a counterclaim, upon the same grounds used in defending a suit for infringement. He asks the court to issue a declaratory judgment that the patent is invalid or otherwise unenforceable, or that the defendant's products are not infringements. In this way, should the plaintiff withdraw his suit, the defendant's counterclaim will still be before the court for adjudication.

The complain, the answer, and the counterclaim are the customary documents filed in the ordinary run-of-the-mill patent suit.

By the time the case comes to trial, the judge has usually required the defendant to narrow down the list of allegedly prior art patents, publications, and uses that he is going to rely upon as anticipatory of the invention. At the same time, the judge has required the plaintiff to state the dates of invention which he is trying to prove, and the particular claims on which he rests his case.

The judge then hears the case. The plaintiff, usually with the aid of a technical expert, such as an engineer or scientist familiar with the field of the invention, explains to the court what the patent covers, translating engineering and technical terms and concepts into layman's language. He explains the

[10] Such as the Clayton and Sherman Acts.

problem that this invention is supposed to solve, and then offers evidence as to what the defendant is doing and why this constitutes infringement of the patent claims. The plaintiff then rests his case. Why? Because our law says that a patent is presumed to be valid; that is, the process of examination in the Patent Office has given the patent an aura of being valid under the law. This means that the defendant has the burden of proving that the patent is not valid. And here the law, at least in theory, imposes upon the defendant a very heavy burden. The plaintiff has presented what is termed a prima-facie case, and it is incumbent upon the defendant to proceed with his proofs. However, in the event that the defendant overcomes, by his evidence, the plaintiff's prima facie case, the ultimate burden of proof of validity rests with the plaintiff.

The defendant may call his technical expert to the stand to explain the disclosures of the prior patents or publications (and also prior uses) before referred to, trying to convince the judge that the invention was either previously disclosed or publicly used, or that, contrary to the patent examiner's view, any individual skilled in the art (as distinguished from an expert) would know how to make this invention. The plaintiff may, of course, cross-examine the defendant's witnesses. When the defendant has completed his defense, the plaintiff has an opportunity to rebut.

The judge must then make a decision. He studies the subsequently filed briefs of the parties and the transcript of the testimony, makes up his mind, and writes a decision. The federal rules of civil procedure require that he make specific findings of fact and conclusions of law, with regard to the validity and infringement of the patent. He must present his findings in writing.

These patent decisions and other decisions in all fields of the federal District Courts are reported in a series of volumes known as the *Federal Supplement*, which is abbreviated as "F. Supp.," with the volume number as a prefix and the page number as a suffix.

The trial judge's decision, however, is not final. He is but the first rung of an echelon. The losing party has a right to appeal from his decision to a Circuit Court of Appeals. A circuit is a geographic area generally comprising a few states. The First Circuit, for example, is composed of Massachusetts, Maine, New Hampshire, Rhode Island, and the possession of Puerto Rico. The Court of Appeals for the First Circuit sits in Boston, and hears appeals from all of the federal District Courts in its circuit. In all, there are ten circuits plus the District of Columbia.

The Courts of Appeals customarily sit in panels of three judges, and review the District Courts' decisions, sustaining the trial judges or reversing them, as the case may be. The decisions of the Courts of Appeals are reported in the *Federal Reporter*, abbreviated "F.," for a first series of volumes, and "F. 2d" for the present second series.

Sitting above these Courts of Appeals is the Unites States Supreme Court. A party losing a patent appeal in a Court of Appeals does not have an absolute right to heard by the United States Supreme Court. Under Article III of the Constitution, the Supreme Court must, in theory, take certain kinds of cases, but these do not include patent appeals. The losing party must, according,

petition the Supreme Court by way of the before-mentioned petition for a writ of certiorari, asking the Court, in its discretion, to review the decision of the Court of Appeals.

The Supreme Court grants very, very few such writs. It is more likely to grant certiorari in a vitally important case involving large companies than in the case of smaller companies, or individual litigants, even though the issues may be the same.

Recent past experience has been that when a Court of Appeals sustained a patent, there was likelihood that the Supreme Court would grant certiorari, and then proceed to destroy the patent. Where a Court of Appeals has thrown out the patent, however, there is no case in modern times of which I am aware where the Supreme Court granted certiorari to reinstate it.

The decisions of the Supreme Court are reported in several different volumes, one of which is the United States Reports, abbreviated as "U.S." I shall, for instance, later refer to the Bell Telephone Cases, which are reported at 126 U.S.

Anyone desiring to find the decisions of trial and appellate courts, accordingly, may consult the *Federal Supplement*, *Federal Reporter*, and *United States* decisions (or, in the case of patents and related fields, the *United States Patent Quarterly*), and he will find there exactly what reasons were advanced by the various courts for sustaining or destroying patents.

With the aid of these reported past decisions, a lawyer can try to instruct his client as to the expression and application of the law by the courts, and so map out a procedure to meet his client's situation.